United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B p/s

ORIGINAL 74-2021

To be argued by
JACOB W. FRIEDMAN

United States Court of Appeals
For the Second Circuit

THE UNITED STATES OF AMERCIA,

Plaintiff-Appellee,

against

WILLIAM DEL TORO and WILLIAM KAUFMAN,

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT WILLIAM DEL TORO

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THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

WILLIAM DEL TORO and WILLIAM KAUFMAN,

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT WILLIAM DEL TORO

Statement of the Case

Defendant-appellant William Del Toro appeals from a judgment of the United States District Court for the Southern District of New York, rendered on July 25, 1974, after trial before Knapp, D.J., and a jury, convicting him of conspiracy (18 U. S. Code Sec. 371), bribery (18 U. S. Code Sec. 201-b-2) and perjury (18 U. S. Code Sec. 1623). This appellant was sentenced to concurrent terms of a year and a day on each count. Enforcement of the mandate has been stayed by this Court pending the appeal.

The Indictment, Statutes Involved, Evidence and Proceedings on Trial

These matters are fully set forth in the brief of defendant-appellant Kaufman, and to avoid needless repetition,

we adopt them in accordance with Rule 28(i) of the Federal Rules of Appellate Procedure.

Grounds of Appeal

1. The alleged potential recipient of the bribe (Pedro Morales) was not a federal official or employee within the scope of 18 U. S. Code Sec. 201 (a).

2. The defense of entrapment was established both through the evidence of instigation and the failure to prove predisposition.

3. Since Kaufman did not testify, the admission of his post-conspiracy statements violated Del Toro's right of confrontation.

4. Any prosecution for conspiracy was barred by its claimed consummation.

5. It was error to charge that an ambiguous answer might constitute perjury.

6. The charge failed to include an adequate discussion of the exculpatory statements and circumstances affecting Del Toro.

7. Grounds presented by appellant Kaufman.

ARGUMENT

POINT I

The alleged potential recipient of the bribe (Pedro Morales) was not a federal official or employee within the scope of 18 U. S. Code Sec. 201 (a).

The statute, entitled "Bribery of public officials and witnesses," states:

> "For the purposes of this section: 'public official' means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror . . ."

The basic question before the Court is whether Morales, who held the office of Deputy Assistant Administrator of the New York City Model Cities Administration, comes within the statutory description. That Administration is financed in part by the United States Department of Housing and Urban Development pursuant to 42 U. S. Code Sec. 3305.

In *United States* v. *Strang*, 254 U. S. 491 (1921), the Court affirmed a demurrer to an indictment, holding that an inspector employed by the Emergency Fleet Corporation —which had been organized by the United States Shipping Board under authority of federal statute—was not an officer or agent of the United States.

Krichman v. *United States*, 256 U. S. 363 (1921), unanimously reversed a bribery conviction based upon payment to a railroad porter to induce him to violate his duty while employed in a station of a railroad controlled and operated by the United States under the pertinent wartime legislation. The Court held the porter not to be "a person acting for or on behalf of the United States in any official function."

In the frequently cited case of *Re Yee Gee*, 83 F. 145 (1897), the Court dismissed the case against an accused who was charged with having offered a bribe to an interpreter appointed by the Secretary of the Treasury, holding the interpreter not to be acting for the government in an official function while serving before a commissioner on the hearing of a criminal complaint.

A significant aspect of this phase of the case is that Morales, whether before or after he assumed the role of informant, lacked the power to accomplish the object of any bribe. When the so-called negotiations to lease the Ludwig Bauman building were in progress, he was utterly without authority to approve the lease or even to recommend its approval. The sole power in this regard was vested in the Real Estate Department of the City of New York. The limit of Morales' authority at any time was recommendation as to site. Under such circumstances the conviction cannot be sustained. The facts come within the principle followed in *Blunden* v. *United States*, 169 F. 2d 991 (1948). There the conviction under 18 U. S. Code Sec. 201 was reversed and the information dismissed upon the simple ground that the Government empolyee receiving the bribe "had no authority to give or even recommend the priority or advantage which the appellants sought."

The effect of the foregoing state of the law is the conclusion that neither bribery nor conspiracy was proven.

Even if it be assumed *arguendo* that Morales was a federal employee—which, of course, we dispute—his ultimate contact with the appellants was manifestly in the status of an informer. One may not be convicted of a crime when facts exist unknown to him which would have rendered the complete perpetration of the crime itself impossible. Cf. *People* v. *Jaffe*, 185 N. Y. 497 (1906).

POINT II

The defense of entrapment was established both through the evidence of instigation and the failure to prove predisposition.

The tapes of the conversations between the informer Morales and appellant Del Toro are replete with instances of Morales' constantly inducing bribery. Thus in Exhibits 4 (pp. 27, 28, 30, 34, 36) and 5 (pp. 77-78) we find Morales' persuasive remarks such as the following:

> "Come on, man . . . That's the reason I'm coming to you . . . You know I'm going to take care of you."

Del Toro's reaction is significant:

> "No, no, no, no. I don't want to be involved."

Then colloquies such as these:

> Morales: "And you don't want to help me. You're a son of a bitch. Damn it . . ."
>
> Del Toro: "I understand, but it cannot be done . . ."
>
> Morales: "You're gonna get some piece of the action."
>
> Del Toro: "Not me, I don't have nothing to do with nothing. You know that."

A situation such as the foregoing eminently calls for the application of the rules concerning entrapment, as most recently considered by the Supreme Court in *United States* v. *Russell*, 411 U. S. 423 (1973), following the previous holdings in *Sorrells* v. *United States*, 287 U. S. 435 (1932), and *Sherman* v. *United States*, 356 U. S. 369 (1958). The fundamental inquiry continues to be whether the criminal design was deliberately implanted or promoted in the mind of an innocent person in order that the latter might be prosecuted. See *United States* v. *Watson*, 489 F. 2d 504 (1973). The entrapment defense is equally applicable to the conspiracy and the substantive crimes charged.

Even as to the perjury the same conclusion must logically follow. With the government having possession of tapes of an individual's conversations, it is obvious that his use as a supposed witness before a grand jury is simply a device or pretext to get him to incriminate himself so as to render him liable to prosecution for perjury. See *United States* v. *Thayer*, 214 F. S. 929 (1963); *Brown* v. *United States*, 245 F. 2d 549 (1957).

POINT III

Since Kaufman did not testify, the admission of his post-conspiracy statements violated Del Toro's right of confrontation.

A part of the Government's case consisted of reading the testimony given by Kaufman before the grand jury, including the recantation involving Del Toro. However, Kaufman did not testify on the trial; Del Toro had no opportunity to cross-examine him; and it is patent that the trial jury could not avoid being influenced by those statements in assessing Del Toro's possible guilt.

It is submitted that the foregoing procedure was clearly violative of Del Toro's rights to confrontation as secured by the Sixth Amendment. The leading cases on this subject are *Krulewitch* v. *United States,* 336 U. S. 440 (1968), and *Bruton* v. *United States,* 391 U. S. 123 (1968). In the six years elapsed since the latter decision, it has been cited in federal reported cases more than three hundred times, including this Court's recent approval in *United States* v. *Percivault,* 490 F. 2d 126 (1974), and *United States ex rel. Rice* v. *Vincent,* 491 F. 2d 1326 (1974). In *Bruton, supra,* the admissions of a codefendant, who did not testify, implicated the appellant and therefore constituted reversible error. The Court found substantial risk that the jury, despite instructions to the contrary, might on a joint trial look to the incriminating statements of the accomplice in determining the appellant's guilt, and that this violated the right of confrontation, Mr. Justice Brennan pointing out further:

> "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify, and cannot be tested by cross-examination."

Moreover, the Courts have consistently rejected "the naive assumption that prejudicial effects can be overcome by instructions to the jury." *Krulewitch, supra.*

POINT IV

Any prosecution for conspiracy was barred by its claimed consummation.

A study of both the indictment and the evidence clearly shows that the substantive offense of bribery claimed to have been committed in furtherance of the conspiracy necessitated the joint action or cooperation of two or

more persons. Under such circumstances the alleged offenders may not be prosecuted for both conspiracy and the substantive crimes. In short, if the object of the alleged conspiracy requires concerted action among the conspirators and the conspiracy was in fact consummated, they may not be prosecuted both for the conspiracy and the substantive offense.

It is settled law that where the substantive crime which is the object of the conspiracy charged has actually been committed (or the Government so contends), there can be no conspiracy to commit where "the substantive crime necessarily required the mutual cooperation of those charged as the conspirators," as this Court held in *United States* v. *Sager*, 49 F. 2d 725 (1931). As Learned Hand, Circ. J., wrote in *United States* v. *Zeuli*, 137 F. 2d 845 (1943):

> "Lower federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it . . . Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U. S. 354; Gebardi v. United States, 287 U. S. 112."

See also this Court's decision in *United States* v. *Center Veal & Beef Co.*, 162 F. 2d 766 (1947).

Finally, in *Pinkerton* v. *United States*, 328 U. S. 640 (1946), the Supreme Court referred with approval to the doctrine of the foregoing cases that there is no basis for "a conspiracy charge" as distinguished from the "substantive charge," "where the agreement of two persons is necessary for the completion of the substantive crime

and there is no ingredient in the conspiracy which is not present in the completed crime."

In the case at bar there can be no doubt that the crime charged as the object of the alleged conspiracy required as a very minimum some reciprocal action of the conspirators. Therefore, upon the commission of the substantive crime a prosecution for conspiracy would not survive, so that the first count of the indictment must be dismissed.

POINT V

It was error to charge that an ambiguous answer might constitute perjury.

The Court instructed the jury that they could convict of perjury if the answers were ambiguous or even true, so long as there was an intent to deceive (1530).

The law will not sustain a perjury conviction based on ambiguous testimony. *Commonwealth* v. *Giles*, 353 Mass. 1, 228 N. E. 2d 70 (1967). The rule was recognized by this Court in *United States* v. *Diago*, 320 F. 2d 898, 907 (1963).

The indictment itself, in so far as perjury is charged, is replete with answers of an ambiguous character, such as: "I don't think so . . . I don't remember that kind of a conversation" (count 4); "I don't recall it . . . It may be possible that I had a conversation something like that" (count 5)—and many others. It therefore was of paramount importance that the Court should have excluded ambiguous testimony as a possible basis for a perjury conviction.

POINT VI

The charge failed to include an adequate discussion of the exculpatory statements and circumstances affecting Del Toro.

In the review of the evidence relating to conspiracy and bribery (1515-1525), the references to Del Toro's alleged participation made only casual mention of his claim "in essence that all he intended to do was to get Morales off his back" (1518). The tenor of the language in effect gives little or no force to the tapes, in the course of which Del Toro, while obviously unaware of the recording procedure, repeatedly negatived any participation, whether in conspiracy or intent to bribe. The error was compounded in its assumption of an alleged conspiracy in August, 1972, in the face of evidence dealing with events four or five months later. Due exception was taken to the foregoing (1533).

It is well established that a trial judge's summary of the evidence for edification of the jury must be fair, adequate and not one-sided. *Williams* v. *United States*, 93 F. 2d 685 (1938). The instructions must carefully maintain a judicial attitude of complete impartiality. *United States* v. *Musgrave*, 444 F. 2d 755 (1971).

The omission becomes especially significant when it is noted that at the time of the motions for judgment of acquittal the Court expressed its own doubts as to the sufficiency of the evidence to establish the guilt of Del Toro.

Grounds Presented by Appellant Kaufman

Several other points are being urged by the coappellant. These for the most part have not been duplicated herein. Such omission is not to be deemed an abandonment thereof should this Court hold them to be meritorious and applicable to both so that the status of this appellant may be comprehended within such determination. Accordingly, the arguments referred to are deemed adopted by reference pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure.

CONCLUSION

The judgment appealed from should be reversed and the indictment dismissed, or, in the alternative, a new trial ordered.

Respectfully submitted,

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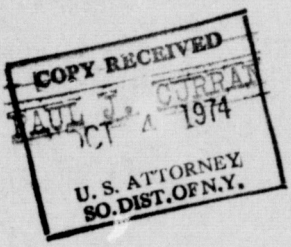

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